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Sex, Love Letters, and Vicious Rumors: Anticipating New Situations Creating Sexually Hostile Work Environments

Chad W. King

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I. INTRODUCTION

"Let every feeble rumor shake your hearts!"[1]

When Virginia Congressman Howard Smith took the House floor on August 23, 1964, he intended to derail the civil rights bill then being argued before Congress by proposing that a single word be added to the measure. His proposal was simple: he would merely insert the word "sex" into the existing language on race and national origin. That, he believed, would be enough to ensure that Congress would never pass the bill.[2]

Much to the surprise of Congressman Smith, his proposal was almost immediately accepted[3] and incorporated into one of the most influential

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1. WILLIAM SHAKESPEARE, CORIOLANUS III.iii.125.

2. *See* Robert Stevens Miller, Jr., *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 884 (1967); *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1167 (1971).

Some commentators argue that Congressman Smith intended his proposal merely as a joke. *See* 110 CONG. REC. 2547-78 (1964) (Congressman Smith commenting on a letter he received from a female constituent); Wetzel v. Liberty Mutual Ins. Co., 511 F.2d 199, 204 (3d Cir. 1975); *Sex and Nonsense*, NEW REPUBLIC, Sept. 4, 1965, at 10.

Other scholars have pointed out that regardless of Smith's intentions, the majority of Congress did not add the language simply so they could share in his odd sense of humor. *See* Michael Evan Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth*, 19 DUQ. L. REV. 453, 457-69 (1981); 110 CONG. REC. 2579-81 (1964) (Representatives Griffiths and St. George speaking at length about employer discrimination against women).

3. Members of the House had little to say about Smith's proposed addition, and floor debate was brief, filling only eight pages in the House Records. 110 CONG. REC. 2547, 2577-84 (1964). Smith himself had scarcely a paragraph to say on the proposal:

> I think we all recognize and it is indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex. Now, if that is true, I hope that the committee chairman will accept this amendment. That is about all I have to say about it. . . .

Id. at 2577. Smith then proceeded to read a letter from a constituent allegedly showing that every woman should have the right to a "husband of her own." *Id.* Ironically, the most intense

pieces of twentieth century legislation—the Civil Rights Act of 1964.[4] Rather than frustrating passage of the bill as Congressman Smith intended, his addition has instead frustrated countless courts, agencies, attorneys, and employers as they attempt to define sexual discrimination and its progeny, sexual harassment.[5]

Presently, two types of sexual harassment are recognized by the courts: quid pro quo harassment and hostile work environment harassment.[6] Quid pro quo harassment occurs when "submission to or rejection of [unwelcome sexual] conduct by an individual is used as the basis for employment decisions affecting [an] individual,"[7] such as when an employee receives or is denied advancement based on his or her willingness to perform sexual favors. Victims of quid pro quo harassment are often injured economically since their jobs, promotions, and pay scales depend primarily, and sometimes exclusively, on their acquiescence to sexual demands.

Sexually hostile work environment harassment[8] is "conduct [that]

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opposition to the proposal came from an ardent feminist, Congresswoman Edith Green, who recognized that the proposed addition was a ploy to defeat the legislation. *See id.* at 2581.

4. For additional insights into the history of Title VII, see F. KENNEDY & W. PEPPER, SEX DISCRIMINATION IN EMPLOYMENT 1-19 (1981); Richard K. Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOK. L. REV. 62 (1965); Miller, *supra* note 2; Francis J. Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966); *Developments in the Law, supra* note 2; Anthony R. Mansfield, Note, *Sex Discrimination in Employment Under Title VII of the Civil Rights Act of 1964*, 21 VAND. L. REV. 484 (1968).

5. In attempting to defeat the Act, Congressman Smith would have been wise to craft his language taking heed of Sir Walter Scott's warning: *O, what a tangled web we weave/when first we practise to deceive*. SIR WALTER SCOTT, MARMION: A TALE OF FLODDEN FIELD 617 (1808) (to which J.R. Pope responded, *But when we've practised quite a while/How vastly we improve our style*. J.R. POPE, A WORLD OF ENCOURAGEMENT, *reprinted in* COLUMBIA DICTIONARY OF QUOTATIONS 521 (Robert Andrews ed., 1993)). As a result of Smith's failed effort, the web of sexual harassment has truly become tangled in the mass of court opinions, agency guidelines, and law review articles on the subject. This is not to say that the Civil Rights Act of 1964 is ineffective. It is, rather, a plea for Legislators to "practise quite a while" and draft their proposals carefully, even when they are merely attempting to defeat a bill.

6. While in theory these are different claims, in fact "the line between the two is not always clear and the two forms of harassment often occur together." Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. N-915-050 (1990) [hereinafter EEOC Notice No. N-915-050]. For example, the line separating quid pro quo harassment and sexually hostile work environment harassment blurs when an employee is constructively discharged because of sexually hostile work conditions, or when a supervisor abuses his or her authority over employment-related decisions to force the victim to participate in sexual conduct. *Id.*

7. 29 C.F.R. § 1604.11(a)(2) (1993).

8. The EEOC is currently considering a regulation that would break "hostile work environment harassment" into "gender hostile harassment" and "sexually hostile harassment." Presently, "hostile work environment harassment" encompasses two areas: (1) harassment

has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[9] This type of harassment ranges from conduct directed at or towards an employee, such as continual requests for sexual favors, obscene or suggestive comments to the victim, ogling, demeaning drawings of the victim, and unwanted touching, to conduct indirectly affecting the employee, such as lewd jokes, vulgar language, and prominent displays of pornography. Sexually hostile work environment harassment primarily affects the victim psychologically and typically does not lead to the same type of economic injury that accompanies quid pro quo cases. While victims of sexually hostile work environment harassment are not forced to leave their jobs as a direct result of such conduct, they may feel compelled to quit because their day-to-day working conditions are intolerable.

Because sexually hostile work environment harassment is typically embodied in words and attitudes toward the victim, rather than in physical sexual demands, it is often much more difficult to identify than quid pro quo harassment. As a result of this difficulty, the definition of sexually hostile work environment harassment continues to evolve as the courts and the Equal Employment Opportunity Commission (EEOC) attempt to piece together the elements, actions, and intentions that underlie this cause of action.[10] This ongoing evolution can be frustrat-

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taking the form of explicitly sexual conduct, which falls under the definitions of both "quid pro quo harassment" and "sexually hostile work environment harassment," and (2) nonsexual hostile environment harassment directed toward an employee because of her or his gender, which also falls under the definition of "sexually hostile work environment harassment."

Under the EEOC's proposal, the second area—nonsexual hostile environment harassment because of gender—would be renamed "gender hostile harassment" and would be treated independently from sexual harassment. The proposed regulation reads:

> (b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:
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> (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
>
> (ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
>
> (iii) Otherwise adversely affects an individual's employment opportunities.

58 Fed. Reg. 51,266 (1993) (to be codified at 29 C.F.R. §§ 1609.1, 1609.2).

For examples of gender hostile harassment (referred to as sexual harassment), see Hall v. Gus Construction Co., 842 F.2d 1010, 1014 (8th Cir. 1988) (finding harassment is not sexual in nature but would not have occurred but for the sex of the victim); Robinson v. Jacksonville Shipyards, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (finding that although sexually explicit content is absent from harassing conduct, if the conduct is directed at women and is motivated by hostility towards women, it is sex discrimination).

9. 29 C.F.R. § 1604.11(a) (1993).

10. *See* Karibian v. Columbia University, 14 F.3d 773, 777 (2nd Cir. 1994).

ing to an employer attempting to develop concrete sexual harassment guidelines for its employees.

In light of this frustration, the purpose of this comment is to help the employer understand and plan for the expanding and changing definition of a sexually hostile work environment.[11] This comment will accomplish its aim in four parts: Part II will present an overview of the statutes and judicial decisions on sexually hostile work environment harassment,[12] with special attention to Supreme Court rulings.[13] Part III will examine several recent interpretations of sexually hostile work environment harassment, presenting three cases holding that employers may be liable for the actions of their employees. Finally, Part IV will conclude with suggestions on how employers can anticipate and address sexually hostile conduct in the workplace.

II. BACKGROUND

A. Title VII: The Sexual Harassment Statute

Congress passed the Civil Rights Act of 1964 to protect broad classes of employees from discrimination in the workplace. The Act states that "[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of such individual's race, color, religion, sex or national origin."[14] But it was not until the Title VII amendments in 1972, eight years after sex had been added to the protected classes of the Civil Rights Act of 1964, that Congress began to take Congressman Smith's addition[15] seriously. In straightforward terms, Congress stated that "[d]iscrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of

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11. This comment focuses primarily on sexually hostile work environment and will deal with quid pro quo harassment only in passing. For additional information on quid pro quo harassment, see generally CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN 32-47 (1979); Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991); Christopher P. Barton, Note, *Between the Boss and a Hard Place: A Consideration of* Meritor Savings Bank, FSB v. Vinson *and the Law of Sexual Harassment*, 67 B.U. L. REV. 445 (1987).

12. The decisions discussed and cited in this comment represent only a small percentage of the decisions addressing sexually hostile work environment harassment. Several important decisions are not treated in this comment because of space limitations.

13. The decisions discussed also have significance for the more general category of employment discrimination. In several respects the sexual harassment decisions are a microcosm of broader ideological shifts that have occurred in employment law over the last three decades.

14. 42 U.S.C. § 2000e-2(a)(1) (1988).

15. *See supra* Part I.

unlawful discrimination."[16] Since that statement, the Civil Rights Act of 1964 has become the backbone of both quid pro quo cases and sexually hostile work environment cases.

B. The EEOC Guidelines on Sexual Harassment

The Civil Rights Act of 1964 created the EEOC to investigate claims of employment discrimination under Title VII and to enforce the Act.[17] The Commission began operations in July 1965, but it did not release its official Sexual Harassment Guidelines until April 1980.[18] In the first draft of the Guidelines, the EEOC defined sexual harassment as "unwelcome behavior" and delineated standards for discerning between a non-harassing, "purely personal, social" conduct and harassing conduct.[19] After the requisite comment period, the EEOC modified the language of the Guidelines to state that:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[20]

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16. H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 5 (1971). *See* S. REP. NO. 92-415, 92d Cong., 1st Sess. 7 (1971) ("While some have looked at . . . women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct."); H.R. REP. NO. 92-238, 92d Cong., 1st Sess. 4-5 (1971) ("[W]omen are placed in the less challenging, the less responsible and the less renumerative positions on the basis of their sex alone. Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964."); Barnes v. Costle, 561 F.2d 983, 987 (D.C. Cir. 1977).

17. 42 U.S.C. § 2000e-4 (1988). *See* Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). In addition to enforcing the Civil Rights Act of 1964, the EEOC also negotiates claims and provides plaintiffs with notices to sue if the negotiations fail. 42 U.S.C. § 2000e-5(b). The President appoints the five members of the EEOC with the consent of the Senate, and each member serves for five years. 42 U.S.C. § 2000e-4(a).

18. 42 C.F.R. § 1604.11 (1980).

19. 45 Fed. Reg. 25024 (1980).

20. 29 C.F.R. § 1604.11(a) (1980). For insights into the history of the EEOC Guidelines see J. Clay Smith, Jr., *Prologue to the EEOC Guidelines on Sexual Harassment*, 10 CAP. U. L. REV. 471 (1981).

Although this definition has not been changed since it was codified in 1980,[21] the EEOC has supplemented the Guideline's language through notices regarding sexually hostile work environment harassment. For example, in 1988 the EEOC issued a notice stating that in determining whether harassment is sufficiently severe or pervasive to create a hostile environment, the harasser's conduct should be evaluated from the objective standpoint of a reasonable person.[22]

Another notice, issued by the Commission in 1990, dealt with issues such as "unwelcome" sexual conduct, elements of a hostile work environment, employer liability for harassment by supervisors, and employer response to sexual harassment claims.[23] For sexual conduct to be "unwelcome," counseled the EEOC, the conduct must be unwelcome "in the sense that the employee did not solicit or incite it, and in the sense that the employee regarded the conduct as undesirable or offensive."[24] In many cases, this requires that the victim take some affirmative step to indicate that the offending conduct is unwelcome, including making a contemporaneous claim or protest.[25]

But unwelcome conduct alone does not give rise to a hostile environment claim. The 1990 EEOC notice defined additional factors of a sexually hostile environment, including:

> (1) whether the conduct was verbal or physical, or both; (2) how frequently it was repeated; (3) whether the conduct was hostile and patently offensive; (4) whether the alleged harasser was a co-worker or a supervisor; (5) whether others joined in perpetrating the harassment; and (6) whether the harassment was directed at more than one individual.[26]

The Commission stated that in order to determine whether unwelcome sexual conduct is harassing, "the central inquiry is whether the conduct 'unreasonably interfer[es] with an individual's work performance' or

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21. *Compare* 29 C.F.R. § 1604.11(a) (1980) *with* 29 C.F.R. § 1604.11(a) (1993) (no change in the language of the regulation since it was originally enacted).

22. *See* Policy Guidance on Current Issues of Sexual Harassment, EEOC Notice No. 915.035 (1988) [hereinafter EEOC Notice No. 915.035].

23. EEOC Notice No. N-915-050. This notice was in response to Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986). *See* Part II.C.

24. EEOC Notice No. N-915-050 (quoting Henson v. City of Dundee, 682 F.2d 897, 903 (11th Cir. 1982)).

25. The EEOC defines a "contemporaneous" complaint or protest as one "made while the harassment is ongoing or shortly after it has ceased." *Id.* at n.7.

26. Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 FORDHAM L. REV. 773, 793 (1993); *see* EEOC Notice No. N-915-050.

creates 'an intimidating, hostile, or offensive working environment.'"[27] This implies that less serious offenses such as sexual flirtation, sexual innuendo, and vulgar language that is trivial or merely annoying will probably not create a sexually hostile environment.[28] Additionally, the EEOC stated that if the conduct would not unreasonably interfere with or "substantially affect the work environment of a reasonable person, no violation should be found."[29]

Most importantly, the 1990 notice contains the Commissions's position regarding employer liability in a hostile work environment. To determine if an employer is liable for a sexually hostile work environment, the Commission[30] will look at three factors: (1) whether the harassing supervisor was acting in an "agency capacity,"[31] (2) whether "the employer had an appropriate and effective complaint procedure,"[32] and (3) whether the victim used the employer's complaint procedure.[33] The EEOC will also examine whether the employer had actual or constructive knowledge ot the harassment. If the employer knew or should have known and "failed to take immediate and appropriate corrective action, the employer would be directly liable."[34]

As the definition of sexually hostile work environment harassment continues to evolve, the EEOC will undoubtedly continue to issue additional guidance on the subject. Currently the EEOC is considering guidelines proposed in 1993 that remove non-sexual gender harassment from the umbrella of sexual harassment,[35] a move that will allow courts and the EEOC to better focus their definition of sexually hostile work environment harassment.

C. Supreme Court Decisions

1. The Court Defines Sexually Hostile Work Environment in Meritor

The Supreme Court heard its first sexually hostile work environment harassment case in 1986. In *Meritor Savings Bank, FSB v. Vinson*,[36] Mechelle Vinson, an assistant branch manager with Meritor Savings

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27. EEOC Notice No. N-915-050 (quoting 29 C.F.R. § 1604.11(a)(3) (1989)).
28. *Id.*
29. *Id.*
30. The courts are also likely to follow this criteria. *See infra* Part IV.
31. 29 C.F.R. § 1604.11(c) (1989).
32. EEOC Notice No. N-915-050.
33. *Id.*
34. *Id.*
35. *See supra* note 8. The proposed guidelines will only affect conduct that is non-sexual in nature. *See* 58 Fed. Rep. 51,266 (1993).
36. 477 U.S. 57 (1986).

Bank, charged that Sidney Taylor, the manager of the office where she worked, subjected her to three years of sexual harassment and sexual abuse. Taylor allegedly propositioned Vinson soon after she began working at the bank and then made repeated demands for sexual favors.[37] Vinson testified that she submitted to these demands for fear of losing her job and estimated that she had intercourse with Taylor between forty and fifty times over a three-year period.[38] In addition, Vinson alleged that Taylor fondled her, exposed himself to her, and even forcibly raped her.[39]

After hearing testimony, the district court held that Vinson's sexual relationship with Taylor was "voluntary" and therefore she "'was not the victim of sexual harassment and was not the victim of sexual discrimination' while employed at the bank."[40] The Court of Appeals for the District of Columbia reversed and remanded the case.[41] The Supreme Court ultimately granted certiorari and unanimously affirmed the reversal, allowing Vinson to go forward with her claim of sexually hostile work environment harassment.[42]

The Supreme Court did not decide *Meritor* until nearly a decade after the first case in which the lower courts recognized sexually hostile work environment discrimination as a viable cause of action.[43] Because of this delay, the Court's decision was, in many respects, anti-climactic. In fact, in *Meritor* the Court did little more than recognize that hostile environment harassment exists when sexual conduct has "the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment,"[44] a fact that the EEOC and many courts had assumed for years.[45]

This is not to say that the *Meritor* opinion is insignificant. The value of *Meritor* lies in its delineation of the elements required to establish a claim based on a hostile work environment. According to a unanimous Court, in order to show a sexually hostile work environment a plaintiff must prove that: (1) sex-based discriminatory harassment occurred with respect to "terms, conditions, or privileges" of employment under Title

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37. *Id.* at 60.
38. *Id.*
39. *Id.*
40. *Id.* at 61 (quoting Vinson v. Taylor, 22 EPD ¶ 30,708, p. 14,693, n.1 (D.C. 1980)).
41. *Id.* at 62.
42. *Id.* at 63.
43. The first case to recognize sexual harassment as a cause of action was Williams v. Saxbe, 413 F. Supp. 654 (D.D.C. 1976).
44. *Meritor*, 477 U.S. at 65.
45. *See, e.g.*, 29 C.F.R. § 1604.11(a) (1980); Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

VII,[46] (2) the harassment was sufficiently pervasive or severe to alter the condition of employment and create an abusive working environment,[47] (3) the conduct was unwelcome,[48] and (4) the employer did not provide a reasonable avenue for complaint or, alternatively, knew of the harassment but did nothing about it.[49] The Court emphasized a subjective approach to determine whether harassment occurred, stating that the "correct inquiry" for a sexual harassment case is whether the victim "by her conduct indicated that the alleged sexual advances were unwelcome."[50]

The *Meritor* decision is also significant for two additional reasons. First, the *Meritor* Court unanimously allowed a claim even when the harassment produced no direct economic injury.[51] Second, the Court ruled that employers were not strictly liable for the harassing acts of supervisory employees in hostile work environment cases.[52] Thus, even after a plaintiff establishes that harassment at the workplace was "severe or pervasive,"[53] an employer might still avoid liability by showing that it was unaware of and did not approve of the supervisor's actions.[54]

2. *The Supreme Court Refines Its Definition in Harris*

In November of 1993, the Supreme Court refined its definition of sexually hostile work environment harassment when it decided *Harris v. Forklift Systems*,[55] adding an objective standard to the *Meritor* subjective standard. In *Harris*, Teresa Harris, a manager at Forklift Systems, Inc., was frequently insulted and made the target of unwanted sexual innuendoes by Forklift's president, Charles Hardy. Hardy's comments, made in the presence of other employees, included "You're a woman, what do you know?" and "We need a man as the rental manager."[56] Further, on one occasion Hardy suggested that he and Harris "go to the Holiday Inn to negotiate [Harris's] raise"[57] and would occasionally ask Harris

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46. *Meritor*, 477 U.S. at 63 (quoting 42 U.S.C. § 2000e-2(a)(1)).
47. *Id.* at 67 (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir.), *cert. denied*, 406 U.S. 957 (1971)).
48. *Id.* at 68.
49. *Id.* at 69-72; *see* Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 62 (2d Cir. 1992).
50. *Meritor*, 477 U.S. at 68.
51. *Id.* at 64.
52. *Id.* at 72.
53. *Id.* at 67.
54. *See* Martha Chamallas, *Writing About Sexual Harassment: A Guide to the Literature*, 4 UCLA WOMEN'S L.J. 37, 43 (1993).
55. 114 S. Ct. 367 (1993).
56. *Id.* at 369.
57. *Id.*

and other female employees to retrieve coins from his front pants pockets.

When Harris complained to Hardy about his conduct, Hardy replied that he was only joking and promised to stop. Based on Hardy's promise, Harris continued to work at Forklift. But despite his promise, Hardy did not end his harassing behavior. When Harris successfully arranged an important deal with one of Forklift's customers, Hardy asked her, "What did you do, promise the guy . . . some [sex] Saturday night?"[58] After this remark, Harris immediately quit her job at Forklift and sued, alleging that Hardy's behavior created a sexually hostile work environment.[59]

While recognizing that some of Hardy's comments offended Harris and would be offensive to the reasonable person, the district court held that Hardy's conduct did not create a hostile environment because it was not so severe that it seriously affected Harris's psychological well-being.[60] Because the district court had closely followed circuit precedent, the Sixth Circuit Court of Appeals affirmed the judgment in a brief, unpublished opinion.[61]

The Supreme Court granted certiorari to address whether conduct must seriously affect the psychological well-being of an employee or lead the employee to suffer injury in order to be actionable. The Court, in a unanimous decision written by Justice O'Connor, adopted a standard that "takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to cause a tangible psychological injury."[62] To accomplish this, the Court added an objective standard to the *Meritor* subjective standard, ruling that discrimination occurs when conduct is severe or pervasive enough to create an objectively hostile work environment that the victim perceives to be abusive.[63] The Court stated that to be actionable, the conduct must be more than the mere utterance of an epithet that engenders offensive feelings in an employee, but that Title VII would come into play before the harassing conduct leads to a nervous breakdown.[64] "Unwelcomeness" and "severity or pervasiveness" are still required elements of the prima facie sexual harassment case.[65] In her concurring opinion,

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58. *Id.*
59. *Id.*
60. *Id.* at 372. The Supreme Court noted that the district court, in focusing on the employee's psychological well-being, was following Sixth Circuit precedent. *Id.*
61. *Id.* at 370.
62. *Id.*
63. *Id.* at 370-71.
64. *Id.* at 371.
65. *Id.*

Justice Ginsburg added that the "critical issue . . . is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[66]

III. Evidence of Expanding Employer Liability: Liability for Sexually Charged Rumors and Love Letters

While the facts of *Meritor* and *Harris* are arguably obvious examples of sexual harassment, employer liability for hostile work environment harassment has recently begun to included acts that might once have been considered trivial. The Southern District of Iowa and the Third Circuit Court of Appeals have both held that rumors in the workplace can create a prima facie case of sexual harassment, and that the employer can be held liable for not stopping the rumors.[67] The Ninth Circuit Court of Appeals has held that love letters can create a sexually hostile work environment and, if not dealt with promptly and correctly, can lead to employer liability.[68]

A. Rumor Cases

1. Rumors Part I: Jew v. University of Iowa

The earliest case dealing with employer liability for rumors, *Jew v. University of Iowa*,[69] arose in the Southern District of Iowa in 1990. In 1973, the Department of Anatomy at the University of Iowa's College of Medicine was split between those faculty members who supported the department head, Dr. Williams, and those who opposed him.[70] During this time, Dr. Jew, who was a long-time friend and supporter of Dr. Williams, came to work in the Department. Rumors soon began circulating among the faculty members that Dr. Jew was gaining favorable treatment because of a sexual relationship she was having with Dr. Williams.[71] The rumors eventually went outside of the Department, circulating within the University, the community, and even "to faculty of other institutions at national professional meetings of anatomists and neuroscientists."[72]

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66. *Id.* at 372.
67. Jew v. University of Iowa, 749 F. Supp. 946 (S.D. Iowa 1990); Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994).
68. Ellison v. Brady, 924 F.2d 872 (9th Cir. 1990).
69. 749 F. Supp. 946.
70. *Id.* at 948-49.
71. *Id.* at 949.
72. *Id.* at 950.

Several male faculty members, two of whom voted against Jew's promotion to full professorship, directed sexually explicit comments and physical conduct towards Dr. Jew, claiming that she was using her sex as a tool to better her position in the Department.[73] For example, over the course of several years one faculty member periodically posted sexually suggestive cartoons and pictures identifying Dr. Jew and Dr. Williams where they could be seen by faculty and students in the Department.[74] Another faculty member yelled sexual epithets at Dr. Jew as she walked down a hall, calling her names such as "slut" and "whore."[75] This conduct, combined with numerous anonymous acts ranging from dirty limericks on bathroom walls to "sexually derogatory" notes,[76] resulted in vicious rumors about Dr. Jew and her relationship with Dr. Williams. Dr. Jew claimed that these left her feeling "hurt, humiliated, and ashamed" and caused her to experience physical health problems.[77]

Applying a five-part sexually hostile work environment test,[78] the district court found for Dr. Jew. The court concluded that the rumors constituted sexual harassment because they falsely accused Dr. Jew of using "her sex as a tool for gaining favor, influence and power with the Head of the Department, a man, and suggested that her professional accomplishments rested on sexual achievements rather than achievements of merit."[79] In meeting the court's five-part test, Jew successfully showed that: (1) she belonged to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) her employer knew or should have known of the harassment in question and failed to take proper remedial action.[80] The

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73. *Id.* at 949-53.
74. *Id.* at 949.
75. *Id.*
76. *Id.* at 950.
77. *Id.* at 951.
78. *Id.* at 958.
79. *Id.*
80. *Id.* at 958-59. This test was adopted by the Eighth Circuit in Moylan v. Maries County, 792 F.2d 746 (8th Cir. 1986). In *Moylan*, the Maries County Sheriff repeatedly came into a female dispatcher's office during working hours and harassed her by attempting to kiss her, put his arms around her, and fondle her. *Id.* at 749. Eventually the sheriff trapped the dispatcher on a couch and raped her. *Id.* at 748. The dispatcher brought an action under Title VII, alleging sexual harassment. The district court dismissed the claim, holding that the plaintiff had failed to establish a Title VII sexual harassment claim because she failed to prove quid pro quo harassment by showing that participation in the sexual activity was a condition of her employment. *Id.* at 747. In its decision, the district court focused exclusively on the elements of quid pro quo harassment and failed to consider the claim based on a sexually hostile work environment. *Id.* at 748.

district court judge additionally held that the University had a responsibility to stop the rumors and ordered the University to promote Jew to a full professor and to pay her back-pay from the date that she should have been promoted.

2. *Rumors Part II:* Spain v. Gallegos

The issue of employer liability for office rumors was recently addressed again in *Spain v. Gallegos*.[81] In 1974, Ellen Spain was hired as an investigator in the EEOC Pittsburgh Area Office. As her career progressed, Spain took positions at other offices but eventually returned to the Pittsburgh Area Office in 1983.[82] Between 1983 and 1986 Spain was passed over for several promotions and filed an internal EEOC complaint alleging racial and sexual discrimination.[83] Shortly after she filed the complaint, Spain was approached by Eugene Nelson, her superior, who convinced her not to proceed on the complaint by promising her that she would receive the next promotion if she would periodically loan him money.[84] Despite EEOC regulations precluding a superior EEOC official from soliciting and accepting loans from a subordinate employee,[85] Spain agreed to his requests.[86] As promised, she obtained the next promotion in early 1986.[87]

Nelson began demanding loans shortly after Spain received the promotion, repeating the demands every four to eight weeks over the next few years.[88] Since it was against regulations for Nelson to solicit the loans, he met with her privately to ask for loans, to receive the funds, and to pay them back.[89] Nelson's frequent demands for loans led other

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The Eighth Circuit Court of Appeals reversed the district court and adopted a five part test from the Eleventh Circuit to determine whether a plaintiff has prevailed on a hostile work environment sexual harassment claim. *Id.* at 749 (citing Henson v. City of Dundee, 682 F.2d 897, 903-05 (11th Cir. 1982)). The test requires the plaintiff to allege and prove that (1) he or she belongs to a protected class, (2) he or she was subject to unwelcome sexual harassment, (3) the harassment was based on sex, (4) the harassment affected a "term, condition, or privilege" of employment, and (5) the employer knew or should have known of the harassment and failed to take proper remedial action. *See* Hall v. Gus Construction Co., 842 F.2d 1010, 1013 (8th Cir. 1988); *Moylan*, 792 F.2d at 749; Dornhecker v. Malibu Grand Prix Corp., 828 F.2d 307, 309 n. 3 (5th Cir. 1987); Yates v. Avco Corp., 819 F.2d 630, 633 (6th Cir. 1987).

81. 26 F.3d 439 (3d Cir. 1994).

82. Brief for Appellee at 4, Spain v. Gallegos, 26 F.3d 439 (3d Cir. 1994) (No. 93-3467).

83. *Spain*, 26 F.3d at 442.

84. *Id.*

85. 29 C.F.R. § 1600.735-203 (1993).

86. *Spain*, 26 F.3d at 442.

87. *Id.*

88. *Id.*

89. *Id.*

employees to often see them together privately in his office, the cafeteria, or leaving the office.[90] Over the years rumors developed in the Pittsburgh office that Spain and Nelson were having an affair.[91]

During casual conversation between 1986 and 1989, Spain heard the rumors that she was having an affair with Nelson.[92] She complained to Nelson about the rumors about four times a year until 1989.[93] In spite of these complaints, the private meetings and loan requests continued, perpetuating the rumors. In late 1989 or early 1990, Spain told Nelson that she would no longer lend him money.[94] Because of this, Nelson allegedly escalated his harassment, ultimately resulting in Spain being denied a promotion as a result of the rumors.[95]

In her complaint Spain alleged that the rumors and Nelson's continued conduct "in the face of the rumors embarrassed Spain . . . and caused her co-workers to ostracize her."[96] As a result, her relationship with her co-workers and her supervisors became strained, "making her feel miserable and unable to 'deal with the situation.'"[97] Spain ultimately brought an action in district court alleging that she had been subject to sexual harassment arising from the false rumors.[98]

The district court ruled *sua sponte* that it would not allow Spain to proceed on her sexually hostile work environment harassment claim based on "Nelson's failure to stop the false rumors in the workplace that he and Spain were having an affair" and dismissed the action.[99] On appeal, the Third Circuit Court of Appeals overturned the district court decision and held that Spain had stated a prima facie case of sexual harassment.

The court stated that five elements must exist in order to successfully show a sexually hostile work environment under Title VII: (1) the employees suffered intentional discrimination because of their sex, (2) the discrimination was pervasive and regular, (3) the discrimination detrimentally affected the plaintiff, (4) the discrimination would detrimentally affect a reasonable person of the same sex in that position,

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90. *Id.*

91. *Id.* A supervisor in the Pittsburgh office testified that he heard rumors that Spain and Nelson had "a relationship going on" and that he was told by a co-worker, "Be careful, you don't want to rub Ellen Spain the wrong way, because if you do, then you're going to have problems with the Director." *Id.* at n.4.

92. *Id.* at 442.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 443.

99. *Id.* at 444.

and (5) the existence of respondeat superior liability.[100] The court, following *Meritor* and *Harris*, noted that these elements included both a subjective standard—conduct affecting the plaintiff—and an objective standard—conduct affecting a reasonable person.[101]

The court determined that Spain satisfied the first element—the employee suffered intentional discrimination because of her sex—with her evidence concerning the rumors and their effects on her environment and advancement. The court found that this element was "satisfied because the crux of the rumors and their impact upon Spain [was] that Spain, a female, subordinate employee, had a sexual relationship with her male superior."[102] This type of rumor, the court continued, carries negative implications in our society when applied to a woman and can cause "superiors and co-workers to treat women in the workplace differently from men."[103] The court determined that if Spain had been a male, rumors would not have circulated that she had influence over Nelson through physically using her sex.[104] In fact, "even if a male had a relationship bringing him into repeated close contact with Nelson, it would have been less likely for co-workers to have believed that the relationship had a sexual basis."[105] Thus, the court concluded, Spain suffered

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100. These five elements were originally identified by the court in Andrews v. City of Philadelphia, 895 F.2d 1469 (3d Cir. 1990). The *Andrews* case concerned two female police officers who were members of the Accident Investigation Division of the Philadelphia Police Department. Pornography and vulgar, sexist language were common in the Division, and testimony was presented that the Division "'was one of the [most] sexist, racist units in the Police Department.'" *Id.* at 1472. Both of the female officers were repeatedly harassed and hassled because of their sex. The harassment ranged from derogatory comments to stealing case files, and eventually resulted in physical injury to one of the female officers when a "lime substance" was put in her shirt. *Id.* at 1474.

The *Andrews* court applied the *Meritor* subjective standard, recognizing that pornography and obscene language could be viewed as highly offensive to women who seek to deal with their colleagues "without the barrier of sexual differentiation and abuse." *Id.* at 1485-86 (citing Bennet v. Corroon & Black Corp., 845 F.2d 104, 106 (5th Cir.), *cert. denied*, 489 U.S. 1020 (1988)). The court stated that "[a]lthough men may find these actions harmless and innocent, it is highly possible that women may feel otherwise." *Id.* at 1486.

101. In *Andrews*, the court explained how much weight it would give to each factor, stating that:

> [t]he subjective factor is crucial because it demonstrates that the alleged conduct injured this particular plaintiff giving her a claim for judicial relief. The objective factor, however, is the more critical for it is here that the finder of fact must actually determine whether the work environment is sexually hostile.

Id. at 1483. In the time between *Andrews* and *Spain*, the Supreme Court affirmed that a hostile work environment claim must contain both objective and subjective harm. *See supra* Part III.C.2.

102. *Spain*, 26 F.3d at 448.

103. *Id.*

104. *Id.*

105. *Id.*

discrimination because she was female that she would not have suffered had she been a male.

Spain established the second requirement for demonstrating a sexually hostile work environment through evidence that "the rumors developed over a period of several years between 1986 and 1990 and manifested themselves through [Spain's] continuous interaction with her colleagues and supervisors."[106] In addition, the court found that Nelson's loan requests occurred during the same time as the rumors, continuing even after Spain asked him to "put an end to the rumors."[107]

The court determined that Spain had met the third element—that the discrimination affected Spain detrimentally—through evidence that her relationship with her co-workers and supervisors deteriorated as a result of the rumors.[108] The court acknowledged that employees are free to associate with whomever they wish to, but held that if sexually based rumors influenced their decision not to associate with another employee, that employee would likely be a victim of sexual discrimination.[109]

The court held that the fourth element was met for many of the same reasons that the third element was met. It held that Spain had described a situation in which a reasonable person would have been detrimentally affected by the unfriendly environment she faced.[110]

Finally, the court found that because Spain's superiors were aware of the rumors and did nothing to stop them, the fifth element—the existence of respondeat superior liability—was automatically met.[111] Based on this and the preceding findings, the Third Circuit Court of Appeals unanimously reversed the district court and allowed Spain to proceed on her sexual harassment claim against her employer, the EEOC.

B. Love Letters

Recently, love letters also have been found to contribute to a sexually hostile work environment. The Ninth Circuit Court of Appeals addressed employer liability for employee love letters in *Ellison v. Brady*.[112] In *Ellison*, Kerry Ellison and Sterling Gray both worked as agents for the Internal Revenue Service (IRS) in San Mateo, California. Although they did not work closely together and were not friends, Ellison accepted an

106. *Id.* at 449.
107. *Id.*
108. *Id.*
109. *Id.* at 449-50.
110. *Id.* at 450.
111. *Id.*
112. 924 F.2d 872 (9th Cir. 1990).

invitation to go to lunch with Gray to lunch in June of 1986.[113] In the four months that followed, Gray pestered Ellison with invitations for lunch and after-work drinks. Ellison declined the invitations, eventually making a point to avoid Gray during lunch time.[114]

In October 1986, Gray handed a note to Ellison on which he had written: "I cried over you last night and I'm totally drained today. I have never been in such constant term oil [sic]. Thank you for talking with me. I could not stand to feel your hatred for another day."[115] When Ellison read the note "she became shocked and frightened and left the room."[116] Ellison reported the note to her supervisor but asked the supervisor to let her handle it. Ellison had no contact with Gray for the rest of the week.[117]

On the following Monday, Ellison left for a four-week training session in St. Louis, Missouri. While she was there, she received a card and a three-page typed, single spaced letter from Gray. The letter read, in part:

> I know that you are worth knowing with or without sex. . . . Leaving aside the hassles and disasters of recent weeks. I have enjoyed you so much over these past few months. Watching you. Experiencing you from O so far away. Admiring your style and elan. . . . Don't you think it odd that two people who have never even talked together, alone, are striking off such intense sparks . . . I will [write] another letter in the near future.[118]

After reading the letter, Ellison promptly telephoned her supervisor and requested that either she or Gray be transferred to a different office.[119] Gray was subsequently transferred to the San Francisco office, and neither Ellison nor her supervisor said anything more on the subject.[120] Three weeks after his transfer, Gray filed union grievances requesting that he be reinstated at the San Mateo office.[121] The IRS agreed to allow Gray to transfer back to San Mateo on the condition that he would leave Ellison alone.[122]

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113. *Id.* at 873.
114. *Id.*
115. *Id.* at 874.
116. *Id.*
117. *Id.*
118. *Id.* Ellison described the letter as "twenty times, a hundred times weirder" than the prior note. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*

In early 1987, Ellison learned that Gray would be returning to her office. Two days later she filed a formal complaint with the IRS alleging sexual harassment, and obtained permission to temporarily transfer to the San Francisco office when Gray returned.[123] The Treasury Department ultimately denied Ellison's sexual harassment claim on the basis that it did not describe a pattern or practice of sexual harassment, and the EEOC affirmed on appeal.[124] Soon thereafter Ellison filed a complaint in federal district court.[125] The court granted summary judgment to the government on the basis that Ellison had failed to state a prima facie case of sexually hostile work environment harassment.[126]

Ellison appealed the grant of summary judgment to the Ninth Circuit Court of Appeals which overturned the district court decision.[127] While the court conceded that Gray's conduct fell "somewhere between forcible rape and the mere utterance of an epithet,"[128] and that the conduct was not particularly pervasive,[129] it nonetheless held that Gray's conduct gave rise to a claim for sexually hostile work environment harassment.[130] The circuit court stated that a reasonable woman could consider Gray's conduct "sufficiently severe and pervasive to alter a condition of employment and create an abusive working environment."[131]

In holding that the IRS could be liable for sexually hostile work environment harassment, the court stated that it was not sufficient to merely transfer Gray and tell him to stop his conduct. Rather, the court suggested that a proper response from the IRS would have been to "express strong disapproval of Gray's conduct, . . . remand Gray, . . . put him on probation, and . . . inform him that repeated harassment would result in suspension or termination."[132] Additionally, the court stated, "[w]e believe that in some cases the mere presence of an employee who has engaged in particularly severe or pervasive harassment can create a hostile working environment."[133]

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123. *Id.*
124. *Id.* at 875. The EEOC affirmed the Treasury's decision on different grounds, concluding that the IRS took adequate action to prevent Gray's harassment in the future. *Id.*
125. *Id.*
126. *Id.*
127. *Id.* at 883.
128. *Id.* at 877 (citing Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).
129. *Id.*
130. *Id.* at 880.
131. *Id.*
132. *Id.* at 882.
133. *Id.* at 883.

IV. DRAFTING AN EFFECTIVE SEXUALLY HOSTILE WORK ENVIRONMENT POLICY

Taken together, *Jew*, *Spain*, and *Ellison* demonstrate an evolving definition of what constitutes a sexually harassing work environment. As the courts refine the elements of proof required in sexually hostile work environment claims, they are beginning to focus on discriminatory behavior that is ongoing and regular, even if the conduct might be regarded by some as "trivial."[134] As the courts begin to condemn what is sometimes viewed as trivial conduct, employers should examine their own conduct and their employees' working conditions.

The EEOC Guidelines point out that "prevention is the best tool for elimination of sexual harassment."[135] The most effective prevention can be accomplished through a strong company policy that explicitly forbids harassing conduct. In fact, the new regulations state that one possible definition of a hostile workplace is any business that does not have an "explicit policy" against harassment.[136] An effective sexual harassment policy should do three things: (1) define a sexually harassing work environment generally, (2) identify specific types of harassing conduct, and (3) promote compliance with the policy through education, enforcement, and penalties.

If defining a sexual hostile work environment were a simple task, the EEOC and the courts would have arrived at a definition long ago. The remainder of this section will focus on defining a sexually harassing environment generally, identifying specific harassing conduct, and offering suggestions regarding how employers can anticipate and address sexually hostile conduct in the workplace.

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134. B. Glenn George recently presented an example addressing the issue of what some may call "trivial" conduct in the workplace:

> Imagine an employer who provides a coffee pot in each male employee's office, but requires female employees to use a common coffee pot at the end of the hall. The "trivial" inconvenience of walking a few extra steps to get coffee is hardly "abusive" and is unlikely to interfere substantially, or even minimally, with a woman's ability to perform her job. But the symbolic implications are clearly intolerable.

B. Glenn George, *The Back Door: Legitimizing Sexual Harassment Claims*, 73 B.U. L. REV. 1, 21 (1993). Although this situation describes "gender harassment" under the EEOC's new guidelines, it is not difficult to imagine "trivial" sexual conduct, such as a supervisor casually putting his or her hand on an employee's hand while they talk.

135. 29 C.F.R. § 1604.11(f) (1993).

136. *See* 58 Fed. Reg. 51,266.

A. Defining A Sexually Harassing Work Environment Generally

Because sexually hostile work environment harassment depends largely upon the circumstances surrounding particular conduct, employers should draft a definition that will include the unique circumstances of their particular business. Several groups, ranging from the EEOC to the Women's Legal Defense Fund, have written general sexual harassment definitions which employers can use as models when drafting their own definition.

1. Using the EEOC Definitions

Although the EEOC Guidelines and EEOC notices on sexual harassment are not controlling on the courts, judges often turn to them because they "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance."[137] Because of this judicial deference to EEOC guidance, employers should be wary of straying too far from the EEOC definition. Generally, an employer will want to begin its own definition by quoting the EEOC's definition of harassment and then expand on it to take into consideration the employer's unique circumstances.

The current EEOC Guidelines include both quid pro quo and hostile work environments within the definition of sexual harassment.[138] The Guidelines state that:

> Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[139]

In addition to addressing the issues raised in the Guidelines, sexual harassment definitions should also address issues that have appeared in EEOC notices and opinions. Employers should remember that EEOC no-

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137. Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (citing General Elec. Co. v. Gilbert, 429 U.S. 124, 141-42 (1976)); *see Ellison*, 924 F.2d at 875; Pease v. Alford Photo Indus., 667 F. Supp. 1188, 1200 (W.D. Tenn. 1987); Gilardi v. Schroeder, 672 F. Supp. 1043, 1046 (N.D. Ill. 1986).

138. *See Meritor*, 477 U.S. at 68.

139. 29 C.F.R. § 1604.11(a) (1993).

tices have stated that: (1) employer liability for a hostile environment is based on the employer's negligence in supervising the workplace by failing to prevent or remedy harassment; (2) sexual harassment is actionable even if the plaintiff did not resist the sexual advances; (3) employers are liable for sexual harassment committed in the workplace by non-employees where the employer knows or should have known of the harassment but fails to intervene; (4) conduct that is initially welcome can become unwelcome and form the basis of a complaint; (5) conduct that is accepted by one individual but not accepted by another can form the basis of a complaint; (6) an employee does not need to be the direct target of harassment in order to have a complaint;[140] and (7) being passed over for a promotion, raise, transfer, etc. in favor of an employee who is sexually involved with superiors gives rise to a claim of hostile work environment harassment.[141] Further, in order to avoid employer liability in hostile work environment cases, an employer's remedies must be timely and aggressive enough to end the harassment.[142]

2. *Using Non-EEOC Definitions*

In addition to the EEOC's definition, private non-EEOC definitions of sexual harassment are also available. Employers can use these non-EEOC definitions either as models for constructing their own definition or simply as a reference with which to compare their existing definition. But in using a non-EEOC definition of a sexually hostile work environment an employer takes a risk. If careless, an employer can inadvertently raise its standard above that required by the EEOC's definition, making the employer liable for otherwise non-actionable conduct.

Non-EEOC definitions can be gleaned from court opinions,[143] books and articles on sexual harassment, and occasionally from literature by local or state business associations or chambers of commerce. The following are several representative non-EEOC definitions of sexual harassment and sexually hostile work environment harassment:

> [Sexual harassment is] [u]nsolicited nonreciprocal . . . behavior that asserts a [person's] sex role over [his or] her function as worker. It can be any or all of the following: staring, commenting upon, or touching

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140. Simply being subject to an offensive environment forms the basis for a harassment claim, even if the complainant is not personally harassed.

141. Kathryn Martell & George Sullivan, *Strategies for Managers to Recognize & Remedy Sexual Harassment*, INDUSTRIAL MANAGEMENT, May 1994 at 5; *see* 29 C.F.R. § 1604.11 (1993); EEOC Notice No. N-915-050; EEOC Notice No. 915.035.

142. Martell & Sullivan, *supra* note 140, at 5.

143. The EEOC notices always address Supreme Court opinions and occasionally address circuit court opinions.

> a [person's] body; requests for acquiescence in sexual behavior; repeated nonreciprocated propositions for dates; demands for sexual intercourse; and rape.[144]

> [Sexual harassment is defined as] [a]ny attention of a sexual nature in the context of the work situation which has the effect of making a [person] uncomfortable on the job, impeding [his or] her ability to . . . work, or interfering with . . . employment opportunities. . . . At one extreme, it is the direct demand for sexual compliance coupled with the threat of firing if a [person] refuses. At the other, it is being forced to work in an environment in which, through various means, such as sexual slurs and/or the public display of derogatory images . . . a [person] is subjected to stress or made to feel humiliated because of [his or] her sex. Sexual harassment is behavior which becomes coercive because it occurs in the employment context, thus threatening both a [person's] job satisfaction and security.[145]

> [Sexual harassment is] [a]ny unwelcome sexual attention in the workplace—either explicit or implicit—that involves a person's term or condition of employment, interferes with their work performance or creates a hostile work environment. Besides such obvious things as actual physical assault, sexual harassment also could include: pressure to go out on dates or to provide sexual favors; sexually explicit pictures in the workplace; suggestive gestures or remarks; and any kind of unwelcome physical contact.[146]

These definitions and others like them are often more inclusive than the EEOC's and should therefore be treated cautiously. Regardless of whether a non-EEOC definition is consulted in the formation of an employer's definition of sexual harassment, the risk of being too inclusive or specific must be balanced with the responsibility of the employer to inform employees of exactly what constitutes sexual harassment. If an employer's definition is too specific, the employer might be liable for trivial conduct; if the definition is too general, the courts might hold the employer liable for failing to issue proper guidelines to its employees.

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144. LIN FARLEY, SEXUAL SHAKEDOWN: THE SEXUAL HARASSMENT OF WOMEN ON THE JOB 14, 15 (1978).

145. Krista J. Schoenheider, Comment, *A Theory of Tort Liability for Sexual Harassment in the Workplace*, 134 U. PA. L. REV. 1461 n.2 (quoting WORKING WOMEN'S INST., SEXUAL HARASSMENT ON THE JOB: QUESTIONS AND ANSWERS 180 (unpublished manuscript, on file with the UNIVERSITY OF PENNSYLVANIA LAW REVIEW)).

146. Larry Reynolds, *Court Rulings and Proposed Regs Will Guide Harassment Policies*, HR FOCUS, Apr. 1994, at 1. This is the operating definition of sexual harassment used by the Women's Legal Defense Fund. *Id.*

But with the advice of good counsel and with a clear vision of what the policy should accomplish, an employer can use these definitions as a model for an effective general definition of sexually hostile work environment harassment.

B. Defining Specific Conduct That Constitutes a Sexually Hostile Work Environment

In addition to defining a sexually hostile work environment generally, an employer's policy should define specific behavior that constitutes sexual harassment. The policy should make it clear that the harassment will be treated as a serious form of misconduct, complete with strong penalties for harassers. Because the list of actions resulting in harassment will likely continue to grow, the employer should give examples that focus on the motivation of the harasser and the feelings and responses of the victim. The employer can also describe the "warning signs" that indicate that sexual harassment may be occurring, such as complaints from members of the opposite sex about conduct or language, indications that social or sexual invitations are not welcome, and visible emotional responses such as anger, fear, or crying.

Employers should periodically survey employees to determine whether problems exist, and if so, what those problems are. For example, in sexual-harassment awareness meetings, employees who work together should clarify what compliments, forms of address, etc., are and are not sexual harassment. If necessary, each person could fill out an anonymous survey describing acceptable and unacceptable conduct. In this way, employers and employees can learn specific examples of sexually hostile conduct directly from other employees. This is particularly important in areas where differences exist between various people's levels of comfort, such as romantic overtures, sexual teasing, obscene language or jokes and display of suggestive materials. This will also give the employer an idea if it is necessary to take a conservative position on co-worker relationships, teasing, personal comments, touching, and any other behaviors that might make employees feel unequal or uncomfortable

While each employer should formulate its own list of harassing conduct, some common examples of potentially harassing behavior should be incorporated into every policy. These examples can include language, joking, stereotypes, attempts at romantic relationships, and sexual advances. Other examples of common harassing conduct include giving underclothing as a gift, putting a hand on someone's hip or thigh, inviting

another to a secluded place for sexual talk, and swearing using sexual terms.[147]

Employees should also have clear definitions of what kind of actions do not make a hostile work environment. A stray rude joke or pat on the shoulder is typically not harassment, although an oversensitive work environment may make it seem so. Employers should clearly define when behavior moves from innocent, sexual non-harassment to sexual harassment. To label all gifts, compliments, private discussions, touching and swearing as sexual harassment cheapens the term and gives employees confused ideas about what actions make a work environment sexually hostile.[148]

Finally, employers and their attorneys should stay abreast of any current cases or statutes that might affect them. In addition to federal laws and EEOC requirements, each state has fair employment laws prohibiting sexual harassment. For example, some states require employers to have an anti-harassment policy.[149] Employers should monitor legal developments at both the state and federal level to ensure their definition and program meets the current standards.

V. CONCLUSION

With the decisions in *Jew*, *Spain*, and *Ellison*, an increasingly difficult picture exists for employers who seek to identify and prevent sexually hostile work environment harassment. This picture, however, is manageable. The law still provides an effective safety net for employers: namely, to state a prima facie hostile environment case, a plaintiff must show that the employer knew, or should have known, of the harassment and failed to take remedial action.[150] Even if harassment occurs, liability can be avoided if the employer has an effective sexual harassment policy and takes timely, appropriate action.[151]

In spite of this protection, employers should aggressively address sexual harassment in their workplaces. Although there is agreement in the courts on the general premise that employers must work diligently to prevent sexual harassment in the first place, and remedy it if it occurs,

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147. *See* Kara Swisher, *Laying Down the Law on Harassment: Court Rulings Spur Firms to Take Preventative Tack*, WASH. POST, Feb. 6, 1994, at H1.

148. *Id.*

149. *See, e.g.*, CAL. EDUC. CODE § 212.6 (1994) (requiring all educational institutions to have a sexual harassment policy); CONN. GEN. STAT. § 10a-55c (1992).

150. *See, e.g.*, Kotcher v. Rosa & Sullivan Appliance Center, Inc., 957 F.2d 59, 62 (2d Cir. 1992).

151. *See, e.g.*, Tunis v. Corning Glass Works, 747 F. Supp. 951, 958 (S.D.N.Y. 1990) (holding that a plaintiff did not state hostile environment claim where plant supervisors took prompt action to resolve the problem), *aff'd without opinion*, 930 F.2d 910 (2d Cir. 1991).

judges and juries have considerable freedom in deciding whether a given response is sufficient to avoid liability. In light of the lack of consensus in the courts in defining harassment, employers should take a conservative view of sexually hostile work environment harassment and develop aggressive, thorough policies and definitions. By drafting a complete, comprehensive definition of sexually hostile work environment harassment, an employer can successfully protect itself from liability while concurrently developing a productive, non-hostile workplace.

Chad W. King